Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term 1998

UNITED STATES OF AMERICA,

Petitioner,

AND

JOHN HUMENANSKY,

VS.

REGENTS OF THE UNIVERSITY OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE BRIEF SUPPORTING PETITION

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to the States was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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John Humenansky, respectfully provides this Response Brief in support of The Solicitor General, on behalf of the United States of America's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioner's App. *infra*, 1a-20a) is reported at 152 F.3d 822. The opinion of the district court (Petitioner's App., *infra* 21a-30a) is reported at 958 F.Supp.439.

JURISDICTION

The court of appeals entered its judgment on August 11, 1998. A petition for rehearing was denied on November 3, 1998 (Petitioner's App., infra, 31a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth at Petitioner's App., *infra*, 32a-48a.

STATEMENT OF THE CASE

The plaintiff in this case, John Humenansky, was employed by the University of Minnesota ("University") from 1969 until he was laid off on May 20, 1994. Petitioner's App., *infra*, 21a. He then filed suit in federal court alleging employment discrimination and retaliation in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § *et. seq.* Id. at 21a-22a. The University moved for summary judgment on the grounds that Humenansky's claims were barred by Eleventh Amendment immunity and that he could not establish a prima facie case of discrimination or retaliation under the ADEA. The trial Court ruled that material issues of fact exist with regard to the discrimination and retaliation claims, but the Eleventh Amendment barred these claims. Id. at 22a.

> The Eleventh Amendment provides that:
>
> the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. U.S. Const. Amend. XI.

The Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, renders it unlawful for employers "to fail or refuse to hire or to discharge an individual or otherwise discriminate against any individual with respect to the compensation, terms, or conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA defines "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State." 29 U.S.C. 630(b). The ADEA authorizes individuals

aggrieved by an employer's failure to comply with the Act to "bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. 626(c)(1).

The ADEA also expressly incorporates some of the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* See 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 ***, and 217 of this title.") One of the incorporating provisions, 29 U.S.C. 216(b), authorizes employees to file suit "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."

On appeal from the district court's decision, the U.S. intervened pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in the ADEA. In a divided panel, the court of appeals affirmed. Petitioners App., *infra*, 1a-20a.

The court of appeals concluded that the district court correctly held that the ADEA's text does not reflect an unmistakably clear intent to abrogate Eleventh Amendment immunity. Petitioner's App., infra, 2a-6a. The court of appeals agreed that the enforcement provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(b), which are incorporated into the ADEA, 29 U.S.C. 626(b), clearly manifest an intent to abrogate. The court concluded, however, that Congress's failure directly to provide such language in the ADEA, rather than simply continuing to incorporate the Fair Labor Standards Act provision, demonstrated either that Congress had "no intent to abrogate for the ADEA," or was "legislative oversight," both of which are insufficient to abrogate immunity. Petitioner's App., *infra*, 4a-6a.

The court of appeals also concluded that, even if the

ADEA did contain a sufficiently clear expression of congressional intent to abrogate Eleventh Amendment immunity, Congress lacked the power to abrogate the immunity. Petitioner's App., *infra*, 6a. The court ruled that the ADEA exceeded Congress's § 5 powers as defined in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), for the reasons set forth in Chief Justice Burger's dissenting opinion in *EEOC v. Wyoming*, which included:

> Congress' power under § 5, however, extends only to "enforcing" The provisions of the Fourteenth Amendment. The Court has described this power as "remedial."…. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

521 U.S. at ____, 117 S.Ct. at 2164 (citation omitted).

The court of appeals ruled that Congress could not prohibit age discrimination to enforce the Equal Protection Clause because this Court has never found unconstitutional any age-based classification and therefore "there has been no judicial definition of invidious ***age discrimination." Petitioner's App., *infra*, 10a. The court thus concluded that the ADEA was not legislation designed to remedy existing constitutional violations. *Id.* at 13a.

District Court Judge Bataillon, sitting by designation, dissented. Petitioner's App. *infra*, 13a-20a. Judge Bataillon reasoned (as has numerous other circuits) "the direct textual references to "state" – state, political subdivision of a state, agency of a state, instrumentality of a state, and state government – in the 1974 amendment to the ADEA clearly expressed Congress' intent to abrogate states sovereign immunity." *Id.* at 16a. The 1974 amendments to the ADEA are fully consistent with both the letter and the spirit of the Constitution. The Constitution guarantees equal protection under the law. Arbitrary and intentional discrimination on

the basis of age violates the Equal Protection Clause. *Gregory v. Ashcroft*, 501 U.S. at 470-71, 111 S. Ct. 2395. *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

John Humenansky, Plaintiff in the subject litigation, and party in the United States of America Petition for Writ of Certiorari, offers this respondent's brief in support of the subject petition. Humenansky confirms his support of the petition and request that the matter be placed on hold until it has been reviewed in *United States v Florida Board of Regents* and *Kimel v. Florida Board of Regents*.

On January 25, 1999, this Court granted review in *United States v. Florida Board of Regents*, No. 98-796, and *Kimel v. Florida Board of Regents*, No. 98-791. The questions concerning the ADEA's abrogation of Eleventh Amendment immunity raised by the United States' petition are identical to those presented in No. 98-796 and No. 98-791. Accordingly, John Humenansky supports the United States and its position that this petition should be held pending the Court's decision in those consolidated cases.

This petition should be granted, as was the earlier petition, because identical questions concerning the ADEA's abrogation of Eleventh Amendment immunity have been raised in a growing number of circuits. The protections afforded by the ADEA to state employees affect hundreds of thousands of employees throughout the country. Various circuits have issued directly conflicting decisions on whether the ADEA abrogates the State's Eleventh Amendment immunity from suit in federal court.

Decisions in the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits, are all in conflict with the Eighth Circuit. The five circuits have upheld the ADEA as proper § 5 legislation. See *Migneault v. Peck*, No. 97-2099, 1998 WL 741545, at **3-7 (10th Cir. Oct. 23, 1998)(citing *Hurd*, 109

F.3d at 1546); *Coger v. Board of Regents*, 154 F.3d 296, 301-302 (6th Cir. 1998);*Keeton v. University of Nev. Sys.*, 150 F.3d 1055, 1057 (9th Cir. 1998); *Scott v. University of Miss.*, 148 F.3d 493, 500 (5th Cir. 1998); and *Goshtasby v. Board of Trustees*, 141 F.3d 761, 765-766 (7th Cir. 1998).

At this time five circuits have ruled in favor of the validity of the ADEA as applied to State employees, while two (including *Humenansky* in the Eighth Circuit) concluded that the ADEA failed to abrogate the States' Eleventh Amendment immunity. The questions presented are of broad importance and currently have left employees in different circuits with different sets of protections.

CONCLUSION

The United States petition for writ of certiorari should be held pending this Court's decision in *United States v. Florida Board of Regents*, No. 98-796, and *Kimel v. Florida Board of Regents*, No. 98-791, and disposed of in accordance with the decision in those cases. John Humenansky, a named party to this litigation, expressly supports the United States petition.

Respectfully submitted.

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